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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 518

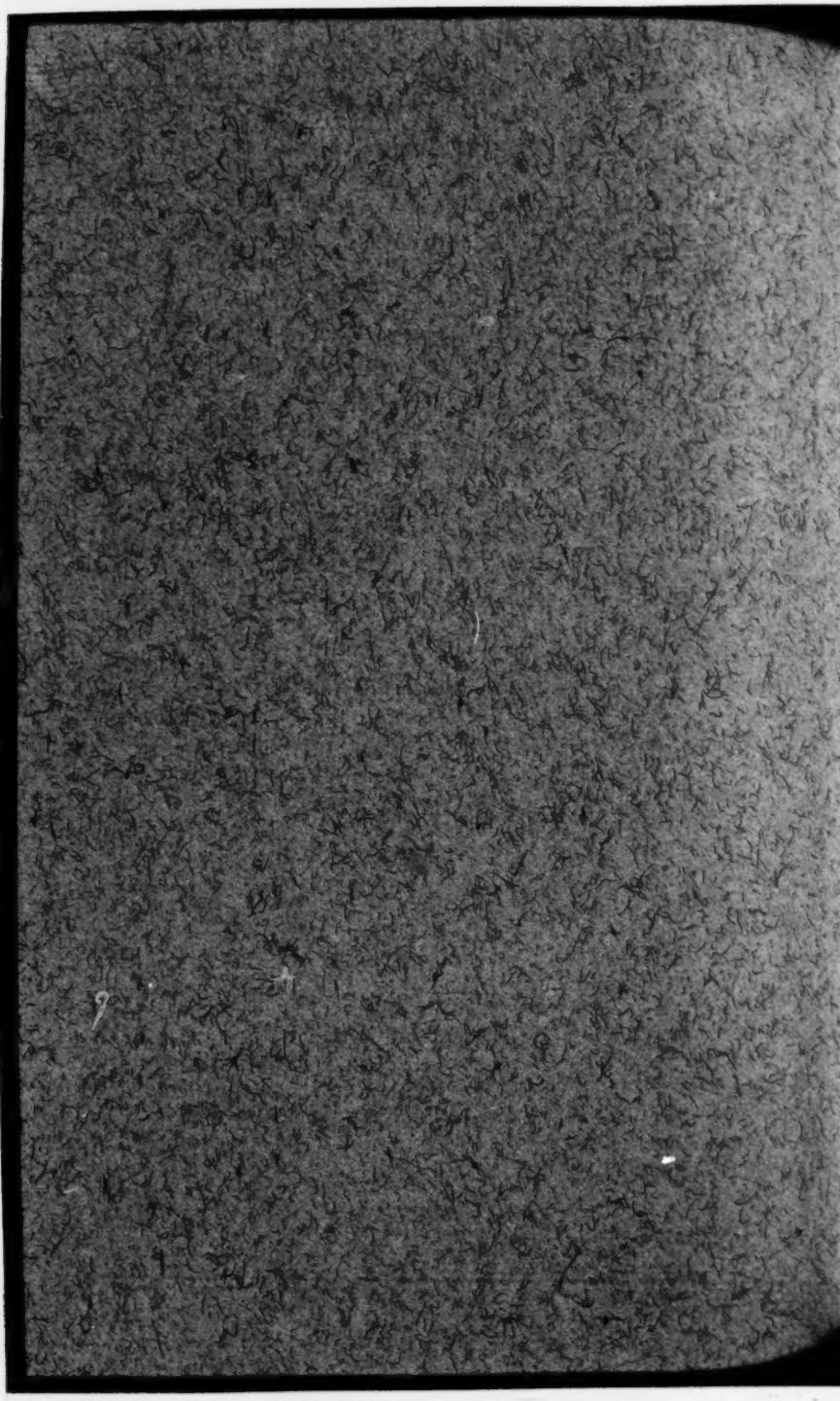
EDWARD G. DOUGHERTY, *Petitioner*

vs.

GENERAL MOTORS CORP.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

NEWMAN & BERK,
SHELDON E. BERKSTEIN,
Counsel for Petitioner.



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Edward G. Dougherty, by his attorneys, and on behalf of himself and all fellow employees similarly situated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 8, 1949.

Opinions Below

The opinion of the district court (R. 26) is not officially reported. The opinion of the Court of Appeals for the Third Circuit (R. 41) is reported at 176 F. 2d 561.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1949. Because of substitution of counsel, this

Court, by an order dated November 5, 1949, extended to and including January 5, 1950, the time for filing a petition for certiorari. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Questions Presented

1. Whether denying a veteran vacation rights which other employees who remained at their employment received, and which the veteran would have received but for his absence in military service, violates Section 8 of the Selective Training and Service Act of 1940.[1]

2. Whether accrual of vacation rights to a veteran during his military service is limited to the accrual to employees on other types of furlough or leave of absence.

Statute Involved

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3(b) shall be entitled to a certificate to that effect upon the the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

• • • • • • •

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a posi-

[1] Petitioner considers that the court below erred in interpreting the collective bargaining agreement so as to deny him vacation rights, and will so argue if the writ is granted. However, he does not urge this as a reason for granting the writ.

tion, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

• • • • • • •

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

• • • • • • •

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

• • • • • • •

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specif-

ically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, reasonably satisfied that the person so applying is entitled to such benefits shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * * *

Statement

On March 20, 1947, Edward G. Dougherty, petitioner, instituted this action against his employer, General Motors, respondent, under Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 308 (hereafter called "the Act") in the District Court of the United States for New Jersey. (R. 2). He claimed pay in lieu of vacation for 1946, the year he was released from naval service and reinstated in his former position pursuant to the Act. (R. 3). The facts were stipulated, except for a brief explanation of Dougherty's 1942 vacation pay at the trial. (R. 10).

He worked steadily for General Motors from the time he was first hired on October 21, 1938, until his induction into the Navy on January 30, 1943. There was a brief interrup-

tion when General Motors converted to war work, which did not affect petitioner's seniority. He was honorably discharged from the Navy April 2, 1946, and applied for reemployment about May 1, 1946. A strike was then in progress, and he was reinstated on June 3, 1946. (R. 27). He has worked steadily for General Motors since then. General Motors refused to give him any vacation pay for 1946, contending that it was not obliged to do so by the Act or the collective bargaining agreement in effect then. (R. 8, 10).

Vacation pay agreements were negotiated annually between the employer and the union to which Dougherty belonged, UAW-CIO. (R. 28, 30, 31, 32, 34). Each agreement from 1942 through 1946 provided that vacation pay for that calendar year should be given to employees working on July 1 of the year, or (beginning in 1944) to employees working during the last pay period in June of the year, provided always they had the requisite seniority. (R. 28, 30, 32, 33, 34). Employees entering military service after these annual dates were granted vacations under the 1942-1945 contracts. (R. 28, 30, 32, 33). Special provisions protected those laid off on these annual dates because of conversion to war production in 1942 or cut-backs in war work in 1945. (R. 28, 33). Employees not actually working on these dates were granted vacation pay if they had worked 75% (reduced to 50% in 1946) of the pay periods during the preceding twelve months. (R. 28, 30-31, 32, 33, 35). Employees with one year's seniority on July 1 of each year were given 40 (48 in 1943-1945) hours average straight time pay in lieu of vacation. (R. 28, 30-31, 32, 33). Those with five years' seniority on July 1 were given 80 (96 in 1943-1945) hours pay. (R. 29, 31, 32, 33, 44a-45a).

In 1946 the amount of vacation pay was changed from the 48 or 96 hours pay to a percentage of 1945 gross earnings. Employees with one year's seniority were given 2%

of their 1945 earnings; those with three years' seniority, 3%; and those with five years' seniority, 4½%. (R. 34-35). In the same agreement the provision granting vacation pay to those subsequently entering military service was deleted. (R. 34). Dougherty was in the navy throughout 1945 and had no earnings in that year. He was discharged from the Navy in April, 1946, too late to work 26 pay periods between July 2, 1945 and June 30, 1946. (R. 27). He received no vacation pay for the month he worked in 1943 (R. 22-23), and none for the seven months he worked in 1946. (R. 35).[2] In his complaint he demanded two weeks' vacation pay at his current hourly rate for 1946. (R. 3). He did not receive, nor does he claim, vacation pay for the period of his naval service. (R. 3, 36, 48a).

The District Court denied his claim entirely, on the grounds (a) to allow his claim would "be a discrimination against non-veteran employees on furlough or leave of absence" who also could not qualify under the 1946 agreement (R. 36); and (b) because Dougherty had no 1945 earnings, "it would be impossible to compute the amount to which he would be entitled" (R. 36); (c) the employer had no rule or practice concerning granting of vacation pay at the time Dougherty entered the armed forces. (R. 36). The Court of Appeals for the Third Circuit affirmed the judgment on appeal on the first two grounds above, saying (a) the 1946 vacation clause did not conflict with the statute

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[2] Perhaps the vacation pay for each year may be attributed to the year July-June rather than the calendar year, because (1) the employee's eligibility was not determined until the end of June; (2) work during the entire period July-June might in some cases determine eligibility, and (3) the payment was not actually made until the last half of the calendar year. If so, Dougherty has still worked eight months without a vacation, or part of one, or pay in lieu thereof: January, 1943 and June-December, 1946, with the difference that his claim for July-December, 1946 would be affected by the 1947 annual agreement. Dougherty does not argue for this interpretation, the employer has not done so, and it may therefore be disregarded.

"as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence" (R. 45); and (b) "the 1946 vacation pay provisions cannot be declared illegal as to Dougherty simply because their effect is to deny him—and any other General Motors employee, veteran or non-veteran, who had no 1945 gross earnings—1946 vacation pay." (R. 45). As a third reason for denying Dougherty any vacation pay, the Court held that he was not discriminated against, saying "we have no reason to believe that the bargaining agents of either the union or General Motors sought or contemplated additional restriction of the veterans' vacation benefits" and "Dougherty cannot gain legal relief from a provision which was intended to apply to veterans and non-veterans alike and which was not 'a skillful device of hostility to veterans.'" (R. 44) [3]

Specification of Errors to Be Urged

The United States Court of Appeals for the Third Circuit erred:

1. In holding that a veteran may, because of his absence in military service, be denied vacation rights which other employees who remained at their employment received, and which the veteran would have received but for his absence in military service.

2. In holding that the vacation rights guaranteed a veteran by the Act accrue to him during his military service

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[3] At the same time, the Court of Appeals recognized that the effect of the 1946 provision was singularly harsh toward veterans. On this point it observed, "We are not unaware that, since few veterans were restored to their positions with General Motors until the closing months of 1945 at the earliest, (our) interpretation—means that veterans restored to duty with that company receive little, if any, vacation pay for the year 1946." 176 F. 2d 561, 562.

only to the extent they accrue to employees on other types of leave or furlough.

3. In holding that a collective bargaining agreement fixing the amount of 1946 vacation pay as a percentage of the employee's 1945 earnings denied any vacation pay to a veteran absent in military service in 1945.

4. In misapplying the principle of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (as reaffirmed in *Oakley* v. *L. & N. R. R.*, 70 S. Ct. 119) by holding that the decision of this Court in *Aeronautical Lodge* v. *Campbell*, 69 S. Ct. 1287, compelled dismissal of Dougherty's action.

5. In affirming the judgment of the district court dismissing the complaint.

Reasons for Granting the Writ

This Court has not heretofore determined the extent to which a veteran continues, under the Act, to accumulate vacation pay or vacation rights during his military service. A large part of the workers throughout the country have such rights. Disagreement and litigation over this issue has been widespread, and the decisions of the lower courts are not in harmony.

Nearly every veteran in General Motors' employ will be affected by the outcome of this suit. Vacation pay for 1946 at General Motors was changed from "two weeks' pay" to "4½% of 1945 earnings." Very few veterans were released from the armed forces until several weeks after V-J day, August 14, 1945. The mass demobilization was not completed until well into 1946. It was therefore almost impossible for a General Motors' employee in the armed forces to have any earnings in 1945 comparable to earnings of employees who remained behind, upon which to compute 1946 vacation pay. General Motors itself, in an effort to

have this suit dismissed before trial as involving issues identical with those in a suit then pending against it in Michigan, has estimated that 50,000 of its employees are interested in this case.[4]

I

The judgment of the court below stands for the proposition that the Act does not require the veteran to be placed in the same status, or at the same level of benefits, in his employment as he would have reached had he remained steadily on the job instead of being absent in military service. To sustain this conclusion, the court relied almost exclusively on *Aeronautical Lodge* v. *Campbell*, 69 S. Ct. 1287. In so doing, it misapplied that decision and ignored the "escalator" principle announced by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 and reaffirmed in *Oakley* v. *L. & N. R. R.*, 70 S. Ct. 119.

The *Fishgold* and *Oakley* cases establish that the purpose of the Act is to protect the veteran against any loss of ground in his employment as a result of his absence in military service; he gains no advantage over other employees beyond what he would have enjoyed had he remained steadily on the job, but he remains on the escalator with them and must not be penalized on his return because of his absence in military service.[5]

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[4] A similar suit, *Cushnier* v. *Ford Motor Co.*, estimated to involve 20,000 employees, has been argued and awaits decision of Judge Picard in Michigan.

[5] *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285).

"As we have said, these provisions guarantee the veteran against loss of position or loss or seniority by reason of his absence. He acquires not

Dougherty asked for such treatment, and for no more. He desires only the status as to vacation pay which he would have achieved had he remained on his job. He does not ask for greater vacation rights than are now enjoyed by non-veterans who remained behind and are his equals in length of service with General Motors, counting Dougherty's military service as part of his employment period. He seeks no form of preference or superseniority over such fellow-employees, but asks for equality with them in respect to vacation pay. He worked approximately eight months (January 1943 and June-December 1946) for General Motors without receiving any vacation pay. He asks only that his absence in the armed forces in 1945 be not held against him so as to deny him any vacation pay for 1946 because he had no earnings in 1945 on which 1946 vacation pay could be computed under the collective bargaining agreement then in effect. Had he not been in military service in 1945, he would have had earnings in that year equal to those of the average employee at his rate of pay. He simply wishes to count his military service as time on the job for the purpose of reaching a status, a level of pay or benefits, which he would have reached but for his military service, as the *Fishgold* and *Oakley* cases entitle

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only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Oakley v. *L. & N. R. R.*, 70 S. Ct. 119:

"We stated, in effect, that an honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment" (p. 122).

him to do.[6] To grant his request will not cause any employee, veteran or non-veteran, to suffer any loss of ground whatever.

There is no question here of exempting veterans generally from changes in collective bargaining agreements which alter the framework of job benefits, seniority, or incidents of employment. Likewise, there is no proposal here to restrict the freedom of an employer or a union to bargain collectively concerning this framework; nor is there any contention that a veteran has a right to vacation pay in the absence of an agreement or custom conferring it. Once the framework is established, however, the Act requires that a veteran's time in military service be treated as time on the job so as to enable him to reach that status, that level of privilege or benefit, that rate of compensation, that degree of advancement, in short that "position" in the framework which he would have reached had not military service blocked his progress.[7] The structure of employment incidents and job features cannot be gerrymandered to deny this credit and to keep veterans from riding the escalator

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[6] The escalator principle of these cases is in accord with Congress' own view of the Act, and has been approved by enactment of Section 9(c)(2) of the Selective Service Act of 1948 (Public Law 759, 80th Cong.), as follows:

"It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Congress regarded this as merely declaratory of the meaning of the 1940 Act. Sen. Rept. 1268, 80th Cong., 2d Sess. (1948) 16.

[7] It should be noted that neither petitioner's claim nor the ground on which he rests it involves payment of vacation pay, or of any other form of compensation, for years in which he was absent from the job. The issue is the proper *level* or *rate* of his job benefits on and after his reinstatement, rather than pay for time not worked. Military service does not excuse the veteran from earning his hire.

operating within this structure. The decision below would permit the veterans to be kept off the escalator in future years by appropriate choice of base year earnings on which to figure vacation pay each year. It would allow hard facts and statutory goals in all areas of veterans' reemployment to be obscured and defeated by fortunate or artful choice of ingenuous words.

The *Campbell* case stands for no such proposition. It decided that the Act did not insulate veterans from the effects of a collective bargaining agreement, adopted during their absence, placing union officials at the top of a seniority list so as to be reached last in a lay-off. Those veterans were not penalized because of their absence in military service; had they remained on the job, they would have been in precisely the same position on the seniority roster. Unlikely Dougherty, their absence cost them no loss of ground. The *Campbell* case merely applied the *Fishgold* principle to a particular situation. In Dougherty's situation, that principle is clearly at odds with the judgment of the court below, and requires its reversal.

II

The court below held that to deny Dougherty any vacation pay for 1946 did not conflict with the statute because he was not thereby placed "in a position inferior to that of non-veterans on leave of absence" (176 F. (2d) at 564). The necessary result of this decision is that the Act protects veterans against loss of ground as to vacation rights only to the extent employees on other types of leave or furlough are granted vacation rights. Thereby, the court not only disregarded the escalator principle, but also deprived Section 8(b) of the Act of any substantive meaning. 8(b) requires that the veteran be restored to "such (former) position or a position of like seniority, status and pay."

This general and basic guaranty is itself sufficient to insure the veteran his place on the escalator and to protect him against penalty on account of his military service.[8] Plainly, vacation rights are as much part of the "status," the "seniority" or the "pay" of the employee protected by 8(b) as they are part of the unspecified job elements as to which the veteran is "considered as having been on furlough" under 8(c).

Following this general guaranty, section 8(c) lists certain specific details, minimum features of job protection, below which the veteran's status cannot be reduced. It is this section which contains the requirements that the veteran must be "considered as having been on furlough or leave of absence" during his military service and must participate in "other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces." These provisions were added in an effort to make the Act a clearer and more effective means of protecting veterans. Both the author of the provisions and the Senate Military Affairs Committee Chairman considered the addition of these clauses to *increase* the protection previously afforded. 86 Cong. Rec. 10,914.

To regard these clauses as a limitation upon, a ceiling over, the general guaranty of the statute contained in 8(b), as did the court below, sacrifices the clear purpose and total structure of the Act to one small clause in it. A collec-

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[8] "the veteran is entitled to be restored to his old *position* • • • if • • • he is demoted, his *status*, which the Act is designed to protect, has been affected • • • he would then lose his *old position*." (Emphasis supplied.) *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 286.

tive bargaining agreement that leave time generally shall not count toward seniority cannot exclude time in military service from seniority under the *Fishgold* rule; no more can an agreement that vacation rights shall not increase or accrue during leave of absence prevent them from increasing and accruing during an employee's military service. The upshot of the decision below is that the veteran's statutory right to retain his place on the escalator can be defeated by an agreement or practice which keeps other employees on leave off the escalator. Under this decision, if the veterans are protected without the statute, the statute also protects them; and if they are not protected without it, the statute does not aid them. This Court has said repeatedly that no such result is intended or reached by this Act.

Moreover, the decision below distorts the plain language of the statute. It denies the veteran the right to vacation pay in accordance with "established rules or practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted," as provided in 8(c). Under those rules, Dougherty obviously was entitled to two weeks' vacation pay. At the same time, it applies against him another clause in that section, "considered as having been on furlough or leave of absence," so as to exclude the veteran from any vacation pay. Consequently, the escalator on which the General Motors veterans stand can move only downward.

In fact, the difficulties and inconsistencies of the Court of Appeals here are only symptomatic of the confusion prevailing among all the courts during the last three years because of the "leave of absence" approach to vacation pay questions. The reasoning and principles in these cases cannot be reconciled, and are frequently in conflict with

the *Fishgold* rule.[9] It is important that this Court end the confusion by reviewing and correcting the judgment below.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

NEWMYER & BRESS,
SHELDEN E. BERNSTEIN,
Attorneys for Petitioner.

Washington, D. C., January, 1950.

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[9] Contrast *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3, 1948) and *MacLaughlin* v. *Union Switch and Signal Co.*, 166 F. 2d 46 (C.A. 3, 1948) with *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C.A. 2, 1948), *Siaskewicz* v. *General Electric Co.*, 166 F. 2d 463 (C.A. 2, 1948) and *Randolph* v. *Seattle Star, Inc.*, 168 F. 2d 274 (C.A. 9, 1948). The *MacLaughlin* case was decided in the veteran's favor on the ground he had worked a year for which he received no vacation pay and the statute excused him from the requirement that he be on the job on December 31 in order to receive it. It is somewhat surprising that the same court should decide the present case against the veteran because employees on non-military furlough at the time he was absent were also denied vacation pay.

District Courts have manifested a similar and equally widespread misunderstanding in their treatment of vacation pay questions. See *Brown* v. *Watt Car & Wheel Co.*, 17 Labor Cases 65,293 (S.D. Ohio, 6/6/49, on appeal to C.A. 6); *Horan* v. *Todd Shipyards Corp.*, 13 Labor Cases 63,942 (S.D. N.Y. 7/22/47); *Flynn* v. *Ward Leonard Electric Co.*, 84 F. Supp. 399 (S.D. N.Y. 1949); *Woods* v. *Glen Alden Coal Co.*, 73 F. Supp. 871 (M.D. Pa. 1947).

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Reply to Brief in Opposition to Petition for Writ of Certiorari

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I

To support its contention that the decision below was correct, General Motors attempts to limit the escalator principle to seniority alone, and cites *Aeronautical Lodge* v. *Campbell* as authority. The case rather clearly stands for the opposite.[1] Respondent argues that the Act increases

[1] "Under the Act the veteran accumulates time toward his seniority while in service; *he also* becomes the beneficiary of those gains the achievement of which is the constant thrust of collective bargaining," and the veteran's "*rights, including* seniority" are within the ambit of the Act. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 525, 527 (emphasis supplied).

the level of only those benefits based "on length of service alone," a principle inconsistent with a vast array of decisions. For example, the veteran is entitled to pay increases due, not to length of service, but to expansion of the enterprise, general rise in wage or salary levels, and war-induced prosperity. *Martin* v. *John S. Doane Co.*, 164 F. 2d 537 (CA 1, 1947); *Loeb* v. *Kivo*, 169 F. 2d 346 (CA 2, 1948); certiorari denied 335 U. S. 891; *Levine* v. *Berman*, 161 F. 2d 386 (CA 7, 1948), certiorari denied 332 U. S. 792.[2]

Apparently somewhat skeptical of this argument, General Motors abandons it by admitting that "such distinction (limiting the escalator to seniority) is one of accidental fact and not of principle." (Br. 11). Respondent then says that the "other benefits" clause of 8(c) is the only provision of the Act having any bearing on vacation pay.[3] It would construe the clause strictly, in isolation from the rest of the Act, so as to deny the benefit unless the rule is by its terms applicable to future years, including the one of the veteran's return. An agreement effective only for the year Dougherty was inducted, says General Motors, cannot be a "rule in effect at the time he was inducted." (Br. 2). How this squares with the literal language of the statutory clause, or with the *Fishgold* requirement of liberal construction in favor of the veteran, General Motors does not say. Nor does it explain what purpose or effect is left for this clause of the Act; under its view, the employer's rule

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[2] The reference is to the first decision in the Levine case.

[3] Respondent seems to attribute this view to petitioner also. (Br. 7) Petitioner's view is, and has always been, that the "other benefits" clause of 8(c) is *not a limit* to the level of benefits the Act guarantees the veteran, whatever might be its operation (1) to maintain unimpaired the veteran's vested interests in such benefits as contributory pension or insurance plans, or (2) to confer benefits where the rule in effect when the veteran was inducted has been revised to eliminate them. Petitioner devoted pages 9, 19, and 27 of his brief before the Court of Appeals to specific explanation of his views on this point, and his entire argument was permeated with and necessarily contained these views.

alone would always protect the veteran and make the Act superfluous.[4]

General Motors itself rebuts this argument by urging that Dougherty's vacation pay was compensation for work actually performed. (Br. 8).[5] If so, it falls squarely within the broad general guaranty of "seniority, status and pay" in 8(b), and the "other benefits" clause of 8(c) is not the sole governing provision. But even this argument has not got General Motors out of the wilderness: if vacation pay is "pay," General Motors can scarcely justify its refusal to pay veterans any portion of it simply because they had no 1945 earnings from which the amount could be computed.[6]

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[4] Dougherty does not urge the application of this clause to his case; he suggests only that the piecemeal construction of the Act advanced by General Motors would qualify him for vacation pay under the literal language of the Act. Petitioner makes this suggestion to demonstrate the difficulties and confusions inherent in General Motors' attempt to limit veterans to the status granted non-veteran employees on leave or furlough, and to show that the statute must be construed as a working whole.

[5] Petitioner does not understand General Motors to argue that 1946 vacation pay was compensation for work performed in 1945. This would contradict General Motors' view that annual negotiation of separate vacation pay agreements for each year requires each year to be considered apart from the others. (Br. 2) Moreover, such argument would seem difficult to sustain. Under the earlier agreements, the vacation pay in each year clearly was compensation (if it was) for the work of that year. The argument would therefore mean double vacation pay for 1945, and none for 1946. It would also render meaningless the agreement's alternative requirement of 26 weeks work in the period July 1945-June 1946. The phrase "percentage of 1945 earnings" replaced "96 hours pay", the only material change made in 1946; so the phrase apparently refers to the *amount* of Dougherty's vacation pay, not to what he has to do to get it. For these reasons, petitioner uses "level of benefits" and similar terms to describe his claim.

[6] Dougherty worked 8 months for General Motors without receiving any vacation pay. In fairness to him, it would seem that he should receive it to the extent it is compensation for performance of work. If vacation pay is partially a reward for loyalty to the employer and an antidote to job fatigue, Dougherty should receive it to this extent.

On discrimination, General Motors claims that so long as there is no intent to discriminate toward veterans, anything goes in collective bargaining agreements. (Br. 9). Lack of malice may be a necessary, but is surely not a sufficient, condition of the agreement's validity. Forgetfulness does not excuse compliance with statutory standards and an agreement pure in motive may be discriminatory in its effects, a condition the court below specifically noted here.[7]

II

Dougherty's case is unimportant says General Motors; it "does not present a fact pattern of such common occurrence as to impel this Court to grant certiorari." Whether a fact pattern affecting, by respondent's own admission, 50,000 people having similar rights under this identical contract (R. 1) is "common" enough need not be determined. For General Motors also argues that the numerous lower court decisions on the question are controlled by common principles and are in absolute harmony. However dubious the harmony, there is no doubt the principles are of general application. By urging that vacation pay is compensation for work performed, General Motors has shown that these principles may determine the proper rate of pay. And in citing the *Nevins* and *Harvey* cases, General Motors has indicated their extension to promotion questions; the decision below is inconsistent with *Morris* v. *C. & O. Railway*, 171 F. 2d 579 (CA 7, 1948), certiorari denied 336 U. S. 967, and *Conner* v. *Pennsylvania Railroad*, 177 F. 2d 854 (CA D. C., 1949), petition for certiorari pending, both holding that a returning veteran must be given promotion opportunities which he would have had by remaining at work instead of entering military service.

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[7] Neither petitioner nor the courts have suggested that General Motors or the union intended to discrimiate against veterans, but General Motors' disclaimers are conspicuous and strident. "If not chastely, at least cautiously."

Respondent's own argument reflects the prevailing confusion over the principles involved.

The statute and the escalator principle it embodies are flexible enough to meet the needs of veterans so as to make them as nearly whole as possible. To discard this principle in favor of a "leave of absence" standard, as respondent suggests, would create an undesirably rigid rule in which the facts and merits of such cases as Dougherty's are obscured. It would permit the Act to be vitiated as to promotions, seniority and general progression, by collective bargaining agreements denying credit in these respects to employees on leave of absence. The penalty against veterans would operate, not for one year, but on every future occasion when lack of credit for military service might bar them from the advantage.

Moreover, the "leave of absence" issue is only half the importance of this case. The other question, ignored by General Motors and so touched only collaterally herein, is whether the veteran is entited to the level of benefits received by employees who remained on the job during his military service. A negative answer to one of these questions does not necessarily imply a positive answer to the other.

Petitioner still thinks the writ should be granted, and respectfully requests that it issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 518

EDWARD G. DOUGHERTY,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, BUICK, OLDSMOBILE, PONTIAC PLANT, LINDEN DIVISION, LINDEN, NEW JERSEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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COUNTERSTATEMENT OF THE CASE.

Petitioner, in his statement of the case, has failed to call attention to certain important facts and has glossed over others which respondent feels cannot be ignored in considering the petition under review.

This case, as petitioner points out, was tried before the United States District Court upon an agreed statement of facts. Therein it was stipulated:

> (1) Vacation pay and vacation benefits were at all times in question the subject of annual negotia-

tion and of separate annual agreement between respondent and petitioner's union (R. 11, 26). Accordingly, at the time of petitioner's induction into the armed forces on January 30, 1943, as in prior and subsequent years, the only established rule and practice in respect of vacation pay and benefits was that of annually negotiating between respondent and petitioner's union a new and different vacation agreement (R. 20, 35).

(2) At the time of his induction, petitioner was paid all of the vacation pay which had accrued to him and to which he was entitled (R. 14, 23, 30).

(3) From January 30, 1943, the date of his induction, until June 3, 1946, the date of his reinstatement, petitioner was not on the payroll of or working for respondent, and he did not receive any wages from respondent during this period (R. 18, 34).

(4) On June 3, 1946, petitioner was reinstated by respondent to a position of like seniority, status and pay to that held by him prior to his entry into the armed forces (R. 12, 28).

(5) In accordance with its annual practice, petitioner's union negotiated with respondent a new vacation agreement for the year 1946. By the terms of that agreement, vacation pay allowances for 1946 were computed on the basis of an employee's gross earnings during 1945 (R. 19, 34). Petitioner, because he did not work for respondent during 1945, did not receive any vacation pay in 1946 under the vacation agreement for that year (R. 19, 20, 35).

In addition to the foregoing stipulated matter, the District Court had before it the provisions of the collective bargaining agreements between respondent and petitioner's union relating to vacations and leaves of absence in effect

during the years 1942 to 1946 (R. 6, 9-20, 26). Under these agreements employees were granted leaves of absence without loss of seniority for reasons of illness or the demands of union business (R. 39). Also, the contracts contemplated possible layoffs due to lack of work and took care to preserve seniority rights in such event (R. 38, 39). For example, paragraph 64 of the 1946 agreement protected an employee with five years or more service from loss of his accumulated seniority although laid off for a period up to 5 years (R. 38). Paragraphs 104 and 105 of that agreement provided for formal leaves of absence without loss of seniority, and paragraphs 106 and 108 provided for sick leaves upon the same terms (R. 38, 39). Paragraphs 109 and 110 provided for leaves of absence up to one year when taken in connection with union business (R. 39, 40). Respondent calls attention to these provisions of the contract because they show concretely the numerous occasions for the non-veteran's absence from work. In any of these events a furloughed non-veteran employee would have been ineligible for vacation pay under the 1946 agreement in the same manner and to the same extent as was petitioner.

The District Court found, *inter alia*, that the 1946 collective bargaining agreement did not discriminate against petitioner's rights guaranteed him by the terms of the Selective Training and Service Act of 1940, 54 STAT. 890, as amended, 50 U. S. C. APP. § 308 (1946), and that to accord him vacation rights in 1946, the year of his reinstatement, would favor him as a furloughed employee over his fellow workers (R. 36).

The Court of Appeals for the Third Circuit, in its opinion unanimously affirming the decision of the District Court, called attention to the fact that petitioner had not even alleged an intentional discrimination (R. 44). It found that

respondent and petitioner's union, in the negotiation of the 1946 vacation agreement, had honestly endeavored to establish a fair vacation standard for all employees (R. 44). Moreover, the Court of Appeals held that where, as here, the intent and operation of the contract did not place veterans in a position inferior to that of non-veterans on leave of absence, the Court could not legally impose a vacation provision different from that bargained and agreed upon (R. 45). "Dougherty," it held, "cannot gain legal relief from a provision which was intended to apply to veterans and non-veterans alike and which was not 'a skillful device of hostility to veterans' " (R. 44).

COUNTERSTATEMENT OF QUESTION INVOLVED.

Whether the 1946 vacation agreement entered into between respondent and petitioner's union, which provided for vacation pay in 1946 based upon 1945 earnings and which affected equally and without discrimination veterans and non-veterans on furlough or leave of absence during 1945, was valid under the Selective Training and Service Act of 1940, as amended.

ARGUMENT.

Introductory.

The Court of Appeals decided the instant case in accordance with both the applicable Statute and the decisions of this Court. The instant case, moreover, is not an appropriate one for certiorari since it presents no other problem than the application of a settled principle to particular facts, and the facts upon which the case turns have been found in respondent's favor by both the District

Court and the Court of Appeals. Finally, there is unanimity of opinion among the Circuits upon the question presented and upon related questions involving the same principle, and there is no element in the instant case which presents this Court with an appropriate occasion for enunciating a general rule of law.

POINT I.

The Court of Appeals Correctly Construed and Applied the Statute in Question.

The first specification of error urged by petitioner reflects a misconception of the Court of Appeals' decision. That Court did not find, as is asserted, that petitioner or any other veteran employee would have received vacation pay under the 1946 agreement but for his absence in military service. Nor did it find that non-veteran employees were guaranteed 1946 vacation pay under that agreement. On the contrary, what the Court of Appeals held was that under the terms of the 1946 agreement veteran and non-veteran employees on furlough or leave of absence during 1945 were all ineligible for 1946 vacation pay, equally and without discrimination. Its opinion reflects a clear recognition of the fact that even had petitioner never been in service he might well have been idle in 1945 for any one of numerous reasons and thus have forfeited any right to vacation pay in 1946.

It is respondent's respectful contention that *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521 (1949) is dispositive of petitioner's remaining specifications of error, wherein he charges in effect that the Act was intended not only to guarantee petitioner a position of

equality with non-veteran employees on furlough or leave of absence but rather to accord him a favored status superior to theirs.

The Court of Appeals unanimously found that the 1946 vacation agreement of which petitioner complains was honestly entered into by respondent and petitioner's union with the intention of setting up a fair vacation standard for all members of the union, veterans as well as non-veterans. It pertinently noted that petitioner does not charge intentional discrimination. Rather, his explanation for basing 1946 vacation payments upon 1945 earnings, to wit, the elimination thereby of the 1946 portion of a strike period when no employees had any earnings, bespeaks fairness and honesty of purpose. The Court of Appeals properly observed that the 1946 requirement of earnings in 1945 not only was intended to, but did in fact, operate equally as to veterans and non-veterans. It was not, said the Court, " 'a skillful device of hostility to veterans' ". It had no anti-veteran objective.

Both the District Court and the Court of Appeals observed that acceptance of petitioner's contention would compel the carving out of a special exception as to veterans which would favor them over non-veteran employees on furlough or leave of absence. The decision of both the District Court and the Court of Appeals that such was not the purpose of the Selective Training and Service Act is in harmony with the holding of this Court that

> "In other words, the Act gives him the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are

> made.[1] In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough,' but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275." (Footnote supplied.) *Aeronautical Industrial District Lodge 727* v. *Campbell, supra.*

Petitioner has urged, at page 9 of the Petition for Certiorari, that the instant case falls within the "escalator" principal announced in *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* Respondent submits that such a view is erroneous. The *Fishgold* case held that the returning veteran is entitled, not merely to the seniority actually accrued before entering service, but also to that which he would have accumulated if he had stayed with the company. Such a rule is consonant with the statute, §8 (c) providing for an absolute accumulation of seniority during military absence. But §8 (c) also provides that "incidental benefits" (which all parties and Courts here involved have treated as including vacation pay) shall be granted to veterans in accordance with the rules applicable to employees on furlough or leave of absence. Thus the plain statutory language indicates that while a veteran must be permitted to accumulate seniority while in service,

---

[1] Dougherty's rights at the time of his induction and upon his restoration were precisely the same as those of the petitioner in the *Aeronautical District Lodge* case, wherein this Court pertinently noted

> "Kirk's rights, including seniority, before he entered the service were derived from the agreement of 1941. So, likewise, were his rights, including seniority, as an employee on furlough defined by the agreement of 1945, inasmuch as that agreement in no wise disadvantaged his position because he was in the military service."

he is entitled to other benefits incidental to his employment only to the extent that they are accorded to non-veteran employees on furlough or leave of absence. As pointed out in *Aeronautical Industrial District Lodge 727* v. *Campbell, supra,* the escalator doctrine of the *Fishgold* case was not intended to rigidify the collective bargaining process, nor to show to the returning veteran any favoritism as against other furloughed employees.

Petititoner erroneously urges that the escalator principle requires that time in military service is to be considered as time on the job for all purposes. However, it is axiomatic that the mere absence from the job necessitated by military service renders impossible a literal return to *status quo* in every respect. Many benefits of employment are dependent upon considerations other than seniority alone and their enjoyment requires on the part of the beneficiary the actual performance of work, the contribution to a fund, or the like. In fact this Court pointed out in the *Fishgold* case that Congress made restoration as *nearly* a complete substitute for the original job *as possible.* In recognition of the great difficulties involved, Congress under Section 8 (c) provided that the returning veteran should have the status and enjoy the benefits of an employee on furlough or leave of absence. Thus, Congress set up a practicable and objective standard and one which precludes application of the seniority escalator principle in respect of benefits based on considerations other than length of service alone.

It should be further noted that under the collective bargaining agreement here in litigation vacation pay is treated as compensation for work already performed. This accords with judicial treatment of the matter. *Siaskiewicz* v. *General Electric Co.,* 166 F.2d 463 (2d Cir. 1948);

MacLaughlin v. *Union Switch & Signal Co.*, 166 F.2nd 46 (3rd Cir. 1948); *In re Wil-low Cafeterias*, 111 F.2d 429 (2d Cir. 1940). To allow recovery in the instant case, therefore, would be to require respondent to pay veterans for work never performed by them. Respondent respectfully submits that Congress did not intend, by the enactment of the Selective Training and Service Act, to sanction any such result.

POINT II.

The Case at Bar is Not an Appropriate One for the Exercise of This Court's Discretionary Jurisdiction.

A. The Instant Case Involves Only the Application of a Settled Rule to Particular Facts.

Under the decision of this Court in *Aeronautical Industrial District Lodge 727* v. *Campbell, supra,* a collective bargaining agreement which satisfies two basic conditions does not violate the Statute even though a veteran fails to obtain certain benefits under it by reason of his being on furlough while in military service. The first condition is that there be no actual intent to discriminate against a veteran merely by reason of his having been in military service. The second condition, which is perhaps merely an evidentiary element of the first, is that the contract clauses in dispute have been drawn in order to further the welfare of employees generally, consonant with the spirit and purpose of collective bargaining. Thus, the Court of Appeals for the Third Circuit properly treated the case as turning upon the existence or nonexistence of a discriminatory intent or effect. Such intention and effect must necessarily turn upon the facts of the particular case, and the instant

case does not present a fact pattern of such common occurrence as to impel this Court to grant certiorari.

The relevant facts on which this case turns, moreover, have been found in respondent's favor by both the District Court and the Court of Appeals. The District Court found that "the collective bargaining agreement, dated March 19, 1946, * * * did not discriminate against petitioner's rights guaranteed him by the terms of the Selective Training and Service Act * * *" (R. 36). Although the District Court set this up as a conclusion of law, respondent submits that it is actually a finding of one of the ultimate facts in the case. The District Court found as an ultimate fact that respondent's conduct met the factual standard of conduct contemplated by the Statute. The Court of Appeals in its opinion found that the bargaining agreement here in dispute was an attempt to set up a fair standard for determining the vacation pay of all employees and was not a " 'skillful device of hostility to veterans' " (R. 43-45). That Court further found that not only was there no discriminatory intent, but also that the contract was nondiscriminatory in its operation (R. 45).

It should be particularly noted that this Court has frequently characterized as a finding of fact within the scope of the Two-Court rule a conclusion, often expressed in the statutory language itself, that the factual conditions upon which a statute predicates the granting or denial of legal relief have been met. E. g., *Virginia Railway Company* v. *System Federation No. 40,* 300 U. S. 515 (1937); cf. *Alabama Power Company* v. *Ickes,* 302 U. S. 464 (1938). The lower court findings in the cited cases present a ready analogy to the finding of the District Court in the case at bar. Since here the Court of Appeals concurred in the

District Court's finding, the issue of discrimination, being essentially one of fact, is not subject to review in this Court.

While it has been suggested that the *Aeronautical Lodge* case involved questions of seniority under the Act, and that this Court has never ruled on a vacation pay case, such a distinction is one of accidental fact and not of principle. Section 8 (b) (B) provides that "such employer shall restore such person to such position or to a position of like seniority, status and pay". Section 8 (c) provides that a person so restored shall be considered as having been on furlough and "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough". Examination of this language shows no such deviation between the two sections as to make the criteria of discrimination in a seniority case inapplicable to a vacation pay case. In fact, this Court has construed the two sections as an organic whole. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* The instant case, therefore, does not present any novel question calling for adjudication by this Court.

B. The Question Here in Issue has been Harmoniously Decided by all of the Courts of Appeals which Have Ruled upon it.

Contrary to the assertion at page 8 of the Petition, there is no confusion among the lower courts. The precise problem here raised in construction of section 8 of the Act has been ruled upon by the Second and Third Circuits. The Second Circuit in *Dwyer* v. *Crosby Co.*, 167 F.2d 567 (2d Cir. 1948) and *Siaskiewicz* v. *General Electric Co., supra,* laid down a rule identical with that adopted by the Court of Appeals for the Third Circuit in the instant case. The Court of Appeals for the Third Circuit cited in its opinion

these two cases from the Second Circuit (R. 45). Parallel decisions on related questions arising under the same section of the Act have been rendered by the Courts of Appeals for the Fifth, Sixth and Ninth Circuits. *Harvey et al.* v. *Braniff Int'l Airways, Inc.*, 164 F.2d 521 (5th Cir. 1947); *Nevins* v. *Curtiss-Wright Corp.*, 172 F.2d 535 (6th Cir. 1949) (promotions, where based on skill and efficiency); *Seattle Star, Inc.* v. *Randolph*, 168 F.2d 274 (9th Cir. 1948) (severance pay, where based on time actually worked). In so far as the absence of conflict among the Circuits will justify the refusal of certiorari, it is respectfully urged that the petition in the instant case should be denied.

C. *Petitioner has Failed to Make an Adequate Suggestion of the Importance of the Questions Involved.*

So far as importance of the question may be deemed to consist in novelty, the instant case presents no important question. As submitted above, the general rule is well settled by *Aeronautical Lodge*, nor is there any suggestion of record that a decision by this Court in the instant case is necessary for the efficient administration of the federal judicial system. Although petitioner has adverted to the impendance of 70,000 virtually identical law suits, respondent submits that there is no reliable evidence of the instant case being so typical in its facts, or of the question having presented such difficulty to the lower federal courts, as to require an authoritative settlement of the problem in this Court. In fact, the unanimity of opinion among the Circuits which have ruled upon the problem indicates that it is a relatively simple one. Moreover, since the general rule is well-settled, an opinion of this Court in the instant case would be interpreted as attaching especial significance

to its particular facts. Such an interpretation by the District Courts and Courts of Appeals would result in an undesirable rigidity in the handling of subsequent cases below. Those courts might feel erroneously precluded from deciding subsequent cases upon their own facts, and might tend to ignore the applicable legal principle in a strained effort to match those facts with the ones now at bar.

CONCLUSION.

For the reasons herein set forth, respondent respectfully urges that the petition for a writ of certiorari should be denied.

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